

**Office of Chief Counsel
Internal Revenue Service
memorandum**

Number: **200950012**

Release Date: 12/11/2009

CC:PA:02:RWyzik
SCAF-130910-09

UILC: 6501.00-00, 6511.00-00

date: September 24, 2009

to: Associate Area Counsel
(Salt Lake City)
Small Business/Self-Employed

from: Ashton P. Trice
Chief, Branch 2
(Procedure & Administration)

subject: Period of limitations under I.R.C. §§ 6501 and 6511 for employment tax reported on Form 941

This memorandum responds to your request for advice.

ISSUES

1. Whether for purposes of calculating the period of limitations for assessment (POLA) under I.R.C. § 6501(a) and the period of limitations for refunds and credits (POLRC) under I.R.C. § 6511(a), with respect to employment taxes, quarterly Forms 941, Employer's QUARTERLY Federal Tax Return, may be aggregated and treated as a single return for a taxable year rather than being treated as four separate returns.
2. Whether an overpayment of employment tax in one quarter can be moved to another quarter if the POLRC has expired for the quarter containing the overpayment.

CONCLUSIONS

1. For purposes of calculating the POLA and the POLRC, with respect to employment taxes, quarterly Forms 941 should not be aggregated and treated as a single return for a taxable year because the limitations periods may vary depending on the date each quarterly Form 941 is filed; and

2. An overpayment of employment tax in one quarter cannot be moved to another quarter if the POLRC has expired for the quarter containing the overpayment before an interest-free adjustment or claim for refund or credit has been made.

FACTS

For our opinion in this matter, we have relied on the following information. If you believe we have misstated the facts or omitted key facts, please let us know as this could affect our opinion in this matter. We received no taxpayer specific facts in conjunction with this request; rather, the Ogden campus appears to have general questions regarding how to calculate the POLA and the POLRC for employment taxes reported on Form 941. They also provided us with several examples, appearing below, which they have asked us to resolve.

LAW AND ANALYSIS

1. For purposes of calculating the POLA and the POLRC, with respect to employment taxes, quarterly Forms 941 should not be aggregated and treated as a single return for a taxable year because the limitations periods may vary depending on the date each quarterly Form 941 is filed.

Form 941 is a quarterly-filed return generally used to report an employer's social security tax, Medicare tax, and income tax withholding obligations. See Instructions for Form 941, "Who Must File Form 941" p.1. Each Form 941 is a separate return and could have a different filing date for purposes of determining the limitations period for assessment or for claiming a refund or credit. Under section 6501(a), the three-year POLA begins running on the date that the relevant return is filed. For purposes of section 6501, a return of employment tax filed prior to April 15th of the succeeding calendar year is deemed to be filed on April 15th of the succeeding calendar year. I.R.C. § 6501(b)(2); Treas. Reg. § 301.6501(b)-1(b). The filing date of an employment tax return filed after April 15th of the succeeding calendar year is the date the return is actually filed. Treas. Reg. § 301.6501(b)-1(b). These rules are illustrated in the example in Treas. Reg. § 301.6501(b)-1(b) which provides that if all the quarterly employment tax returns for a calendar year are timely filed, the POLA with respect to each return is the same and is measured from April 15 of the succeeding calendar year. Treas. Reg. § 301.6501(b)-1(b). However, if any of the quarterly returns is filed after April 15 of the succeeding calendar year, the POLA with respect to that return is measured from the date the Form 941 is actually filed. Id. Furthermore, section 6501(c)(3) provides that in the case of failure to file a return, the tax may be assessed at any time. Because the POLA could vary for the tax reportable on each of the quarterly Forms 941, the Forms 941 should not be aggregated and treated as a single return for purposes of determining the POLA.

The same principles prohibit quarterly Forms 941 from being aggregated for POLRC purposes. Under section 6511(a), the period within which to file a refund claim

ends either three years after the date the employment tax return is filed or two years from the time the tax was paid, whichever is later, or, if no return was filed, within two years from the time the employment tax is paid. I.R.C. § 6511(a). For the purpose of determining the limitations period on refund claims, section 6513(c)(1) states that a return of employment tax filed prior to April 15th of the succeeding calendar year is deemed to be filed on April 15th of that year. See also Treas. Reg. § 301.6513-1(c). For purposes of section 6511(a), an employment tax return filed after April 15th of the succeeding calendar year is considered filed on the date the return is actually filed. Section 6513(c)(2) provides that if a tax with respect to remuneration or other amount paid during any period ending with or within a calendar year is paid before April 15 of the succeeding calendar year, the tax shall be considered paid on April 15 of that year. Because the limitations period for filing a refund claim may vary depending upon the filing date of each quarterly Form 941, the quarterly Forms 941 should not be aggregated and treated as a single return for purposes of determining the POLRC. See I.R.C. § 6511(a).

2. An overpayment of employment tax in one quarter cannot be moved to another quarter if the POLRC has expired for the quarter containing the overpayment before an interest-free adjustment or claim for refund or credit is made.

Under section 6402, the IRS, within the applicable period of limitations on credit or refund under section 6511, may credit the amount of an overpayment, including any allowable interest, against any tax liability of the person who made the overpayment, and shall, subject to certain offsets, refund any balance to such person. Section 31.6402(a)-2 sets forth the rules for claiming a credit or refund of overpaid employment taxes.

Under section 6413, an overpayment of employment tax may be adjusted without interest within the applicable period of limitations on credit or refund under section 6511. Sections 31.6413(a)-1 and 31.6413(a)-2 set forth the rules for making interest-free adjustments of overpayments of employment taxes.

Consequently, an overpayment of employment taxes in one quarter may be credited to another quarter or refunded to the taxpayer, either under section 6402 or section 6413, subject to the applicable period of limitations on credit or refund under section 6511. Thus, a credit for an overpayment of employment taxes can be applied to another quarter only if the POLRC remains open for the quarter in which the overpayment occurred. If a claim is not filed or an adjustment is not made within the POLRC, section 6511(b)(1) prohibits the credit or refund of the overpayment.

Examples

1. Deposit of Tax for a Quarter for Which Taxpayer Files no Form 941: Employer makes a timely deposit of tax for the first quarter of 2004, but fails to file Form 941 for first quarter of 2004. Employer timely files Form 941 for the last three

quarters of 2004. Prior to expiration of the POLRC for the fourth quarter of 2004, the Service adjusts the liability for the fourth quarter so that the total of the second, third and fourth quarter liabilities agree with the taxes reported on the corresponding Forms W-2, which results in a fourth quarter underpayment. Employer requests in January 2009 that the deposits from the first quarter of 2004 be treated as an overpayment and applied to satisfy the fourth quarter underpayment. Can a first quarter deposit be applied to satisfy the fourth quarter underpayment?

First, without the filing of a return, it is not clear that there is any overpayment to be applied from that quarter. Second, absent the filing of a return, the POLRC for the first quarter of 2004 expired on April 15, 2007. Employer cannot successfully claim a credit in January 2009 for any overpayment that might exist. Assuming Employer deposited its tax for the first quarter of 2004 prior to April 15, 2005, under section 6513(c)(2) the POLRC for the first quarter began running on April 15, 2005. Because Employer filed no Form 941 for the first quarter, under section 6511(a) the POLRC on the first quarter expired on April 15, 2007, two years from the April 15, 2005 deemed payment date under section 6513(c)(2). If Employer ultimately files the Form 941 after the expiration of the two-year period, the POLRC would then expire three years from the filing date and the claim for credit would be timely, but the amount of the credit would be limited to the amount paid within the period immediately preceding the filing of the claim, equal to three years plus the period of any extension of time for filing the return. I.R.C. § 6511(b)(2)(A); see Rev. Rul. 76-511.

Had Employer timely filed its Form 941 for the first quarter of 2004, under section 6513(c)(1) the deemed filing date of that return would have been April 15, 2005. Because the POLRC for any first quarter overpayment would have expired on April 15, 2008 (three years from the deemed filing date of April 15, 2005 under section 6513(c)(1)), Employer would still not have been entitled to a credit for any first quarter overpayment because Employer requested a credit for the first quarter overpayment in January 2009, which is after the POLRC would have already expired.

2. Deposit of Tax for a Quarter for Which Taxpayer Late-Files Form 941: Employer timely deposits tax for all quarters of 2005. Employer timely files Forms 941 for the third and fourth quarters of 2005, but does not file Forms 941 for the first and second quarters of 2005. Employer receives a letter from the IRS on May 1, 2009 informing it that it has payments on quarters where no return has been filed and asking that it file the missing returns. On May 15, 2009, Employer files the missing returns for first and second quarters of 2005. Based upon the first and second quarter 2005 return information, Employer determines that deposits made in 2005 for the first quarter of 2005 were in excess of its first quarter 2005 liability and that deposits made in 2005 for the second quarter were insufficient to cover its second quarter 2005 liability. As such, when Employer files the missing returns, Employer requests that the overpayment from the first quarter be applied to the second quarter underpayment.

- a. Can the first quarter overpayment be applied to satisfy the second quarter underpayment?

Section 6511(a) provides that the POLRC expires on the later of the three-year period from the time the return is filed or the two-year period from the time the tax is paid. In this example, the POLRC begins to run from May 15, 2009, the date the Forms 941 for the first and second quarters are actually filed because the three-year filing period expires later than the two-year payment period. See I.R.C. § 6511(a); Rev. Rul. 76-511. Therefore, the POLRC expires on May 15, 2012, three years from the May 15, 2009 actual filing date. However, Employer is not entitled to the credit, even though the claim for the credit is made within the POLRC. Section 6511(b)(2)(A) states that if a claim for a refund is filed within the three-year period from the filing date of the return, the amount of the credit or refund is limited to the amount paid within the period immediately preceding the filing of the claim, equal to three years plus the period of any extension of time for filing the return. Because the Forms 941 were filed on May 15, 2009, Employer's claim for credit is limited to payments made on or after May 15, 2006. The 2005 tax deposits, which were timely made, are deemed to have been paid on April 15, 2006, and fall outside this look-back period. See Treas. Reg. §§ 31.6302-1(h)(5), (i)(6); I.R.C. § 6511(b)(2)(A). Thus, the first quarter credit overpayment cannot be applied to satisfy the second quarter underpayment. See Rev. Rul. 76-511.

- b. If there had been an underpayment in the first quarter, rather than an overpayment, could the IRS assess the underpayment on May 15, 2009?

Under section 6501(a), the POLA for the first quarter 2005 expires three years from the date the Form 941 was filed or deemed filed. Because Employer did not file its Form 941 for the first quarter of 2005 prior to April 15, 2006, under Treas. Reg. § 301.6501(b)-1(b) the POLA is calculated from the date on which Employer actually filed the Form 941, here May 15, 2009. The POLA expires three years after that date, on May 15, 2012. I.R.C. § 6501(a). As such, the underpayment may be assessed at any time on or before May 15, 2012.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.